

(51)

**Central Administrative Tribunal  
Principal Bench**

OA No.1225/2003

New Delhi this the 14<sup>th</sup> day of December, 2006.

**Hon'ble Mr. Shanker Raju, Member (J)**  
**Hon'ble Mrs. Neena Ranjan, Member (A)**

1. Amarjeet Singh  
S/o Shri Hari Singh,  
R/o WZ-144,  
Ravi Nagar,  
New Delhi-18.
2. Rajinder Singh,  
S/o late Shri Har Nath,  
R/o House No.11, Khera Kala,  
Delhi-82.

-Applicants

(By Advocate Shri Sant Lal)

**-Versus-**

Union of India through:

1. Secretary,  
Ministry of Information  
& Broadcasting,  
Shastri Bhawan,  
New Delhi-1.

-Respondents

(By Advocate Shri S.M. Arif)

1. To be referred to the Reporters or not? *yes*
2. To be circulated to outlying Benches or not? *yes*

*S. Raju*  
(Shanker Raju)  
Member (J)

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New Delhi-1.
2. The Director General,  
All India Radio,  
Akashvani Bhawan,  
Parliament Street,  
New Delhi-110 001.
3. The Station Director,  
All India Radio,  
Broadcasting House,  
Parliament Street,  
New Delhi-110 001.
4. The Director General (News),  
News Services Division,  
Broadcasting House,  
Parliament Street,  
New Delhi-110 001.

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(By Advocate Shri S.M. Arif)

**O R D E R**

**Mr. Shanker Raju, Hon'ble Member (J):**

As reliefs claimed in paragraphs 8 (iv), (v) and (vi) have been foregone by applicants, this OA now deals with a challenge to promotion of applicants as Transport Assistant and also a relief to promote them as Motor Drivers Grade-II w.e.f. 1.8.1993 from the date of their juniors, with all consequential benefits and also consideration for promotion as Motor Driver Grade-I in turn.

2. Applicants who completed their probation as Motor Drivers on 6.2.1987, the then promotional avenues existed for the Motor Drivers were Motor Mechanic and Senior Motor Mechanic to be filled up 100% by promotion. However, applicants had been deputed in 1988 to function as Transport Assistants. However, though the recruitment rules of Group 'C' non-gazetted, non-ministerial for the posts of Transport Assistant the only method of recruitment when was direct recruitment 100% and the age limit was 25 years, a wrong decision by the DPC construing the recruitment rules to be on 100% probation in its meeting held on 5.7.1995, recommended on fitness names of applicants for promotion as Transport Assistants. Applicants took charge of the posts of Transport Assistant on 12.7.1995 and had also sought for annual increments. Subsequently, three-grade structure introduced in 1993, where on completion of certain requirements of regular service Grade-II and Grade-I have been accorded to the Motor Drivers and accordingly an order passed on 17.1.2002 applicants were placed in Grade-II as Motor Car Drivers while working as Transport Assistants w.e.f. 9.7.1994. A seniority list

issued of Motor Drivers incorporated names of applicants, whereby it has been noted against their names that they have been promoted as Grade-II TPT. Representations made to be accorded Grade-II of the Drivers and Grade-I when in the wake of special grade introduced vide DoP&T OM of 15.2.2001 in the promotion Scheme for Staff Car Drivers, the claim when not settled, gives rise to the present OA.

3. Learned counsel appearing for applicants, states that applicants who were Motor Drivers had been wrongly promoted *de hors* the rules as Transport Assistants in 1995. As their fundamental right as a Driver to be considered for higher grade in the wake of the Scheme of the DoP&T promulgated in 1993 and revised in 2001 there cannot be any estoppel or waiver against this and as the respondents themselves have treated applicants as Motor Driver Grade-II on accord of benefits and their names were included in the seniority list. It is stated that a promotion *de hors* the rules would not confer any indefeasible right and their promotion now to be by change of cadre in the light of the decision of the Apex Court in **Vasant Rao Roman v. Union of India**, 1993 Supp. 2 SCC 324 and **ICAR v. T.K. Suryanarayanan**, 1997 (2) SCSLJ 303.

4. Learned counsel has also relied upon a decision of the Apex Court in **State of Tripura v. K.K. Roy**, 2004 (1) SCT 331, to contend that the promotional avenues should be provided to a government servant.

5. Learned counsel would contend that a wrong promotion would not vest a right on applicants; accordingly they have a right to be considered in their category of Motor Driver.

6. Insofar as limitation is concerned, it is stated that in the matter of discrimination as others who have been functioning as Motor Driver have already been promoted to the higher grades, depriving applicants of the aforesaid is not in consonance with law.

7. On the other hand, learned counsel appearing for respondents contended that the present OA is barred by limitation, estoppel and waiver, as applicants having accepted their appointments as Transport Assistant in 1995 have raised their grievance only in 1998 due to four-grade structure introduced in the cadre of Staff Car Driver.

8. However, it is stated that the DPC on a wrong premise on the direct recruitment vacancies promoted applicants. It is also stated that vacancy position now shown by applicants is not in accordance with law and is not factually correct and in his reply to the amended OA it is stated that what had been given in 2002 to applicants the pay scale of Grade-II is a retrospective action in the wake of the DoP&T instructions in the graded structure of Drivers. However, as applicants were due for same in 1994 their entitlement has been fulfilled but from 1995 they are not entitled being in a separate cadre, which has, according to respondents, promotional avenues for promotion as ATS and TA. It is stated that now any change in the cadre of applicants would adversely affect the seniority of others as well as their promotion.

9. On careful consideration of the rival contentions of the parties and perusal of the record the Apex Court in **Dwarka Prasad v. Union of India**, 2004 (1) ATJ SC 791, ruled that right to be considered on fair and equal basis in promotion without discrimination is a fundamental right of a government servant.

10. It is also trite in the light of the decision of the Apex Court in **SI Rooplal v. Lt. Governor**, 2000 (1) SCC 644 and in **Union of India v. Wing Commander T. Parthasarthy**, 2001 (1) SCC 158, that a substantive legal and fundamental right cannot be defeated either by waiver or by a decision of the Government. A Division Bench of the Allahabad High Court in **Manikant Gupta v. State of U.P.**, 2004 (1) ATJ HC 349, insofar as fundamental right in service is concerned, relying upon the decision of the Apex Court in **Mahavir Oil Mills v. State of Jammu & Kashmir**, JT 1996 (10) 837 and **Olga Tellis v. Bombay Municipal Corporation**, AIR 1986 SC 180, held that there cannot be any waiver or estoppel against a fundamental right.

11. In the light of the settled law, we are of the view that even if applicants had continued on the posts of TPA their earlier consideration, which is *de hors* the rules and their fundamental right of consideration in their cadre as Motor Drivers, cannot be defeated, because by implication or conduct applicants have accepted the promotion as TPAs.

12. Any promotion made *de hors* the rules would not vest, as per the decision of the Apex Court in **Vasant Rao Roman's** case (supra), right of an employee to continue would also *mutatis mutandis* extends to a situation where the promotion given *de*

*hors* the rules would have no sanctity in law. Merely because applicants had continued but the fact that on accord of graded structure in 2002 in Grade-II of the Motor Driver from retrospective effect from 1994 the respondents themselves accorded the benefit though accrued in the post, yet their names also figured in the seniority list of Motor Drivers. Applicants have agitated this issue right from 1998 and once their fundamental right of consideration against the posts in their cadre and discrimination meted out to them vis-à-vis their juniors and counterparts in the same cadre, whereby not only they have been accorded the graded structure but in the wake of instructions issued in 2001 a special grade as well. The fact that applicant was promoted *de hors* the rules has been admitted on record and clearly accepted by the respondents.

13. The cardinal principle of estoppel cannot be raised against a statute or law. There cannot be a waiver of a right. If the respondents had acted illegally and applicants had continued on the posts which carry the same pay scale as they were having, in absence of any record as to conversion of direct recruitment post on sanction as promotional one, their continuance on these posts would not entail any legal implication or a right thereof. Accordingly, their request for treating them as Motor Driver and consequent extension of the benefits as per the graded structure promulgated in the cadre of Motor Driver by the DoP&T would have to be extended to them, failing which it would be an invidious discrimination, which shall violate Articles 14 and 16 of the Constitution of India.

14. We are satisfied that there is no delay by applicants to prefer this OA, as assertion of a right as fundamental right for consideration for promotion is a continuing breach and a recurring cause of action.

15. In the result, for the foregoing reasons, this OA is partly allowed. We direct respondents to reconsider the claim of applicants to be treated as in the cadre of Motor Driver and for extension of the benefit of the graded structure of Driver in Grade-II from the date(s) juniors have been accorded the same with all consequential benefits and for consideration of further promotion in turn. The aforesaid consideration shall culminate into a reasoned order to be issued within a period of two months from the date of receipt of a copy of this order. No costs.

*N. Ranjan*

**(Smt. Neena Ranjan)**  
**Member (A)**

*S. Raju*

**(Shanker Raju)**  
**Member (J)**

‘San.’